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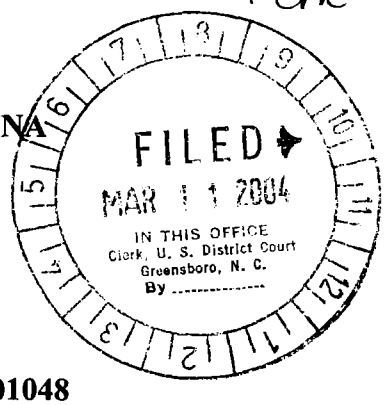

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JAMES TALTON, JR.	)	
	)	
Plaintiff,	)	
	)	
v.	)	**1:02CV01048**
	)	
I.H. CAFFEY DISTRIBUTING COMPANY, INC., and CHRISTOPHER CAFFEY,	)	
	)	
Defendants.	)	

ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on (1) the motion of Plaintiff James Talton, Jr. for partial summary judgment on his FLSA claim (Pleading No. 35); (2) the motion of Defendants I.H. Caffey Distributing Company, Inc. ("IHC") and Christopher Caffey ("Caffey") for summary judgment on all of Plaintiff's claims (Pleading No. 38); (3) the motion of Plaintiff to exclude two of Defendants' affidavits (Pleading No. 45); (4) the motion of Defendants to strike several of Plaintiff's affidavits and exhibits (Pleading No. 49); (5) the second motion of Plaintiff to exclude two of Defendants' affidavits (Pleading No. 56); and (6) the motion of Plaintiff to enlarge the time period for filing materials in support of his memorandum in opposition to Defendants' motion for summary judgment (Pleading No. 59.) The motions have been fully briefed and are ready for a ruling.

I. Procedural History

Plaintiff Talton filed a Complaint in this Court on November 29, 2002, alleging that Defendants failed to pay him all regular and overtime wages when due in violation of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 *et seq.*, and the North Carolina Wage and Hour

Act ("NCWHA"), N.C. Gen. Stat. § 95-25.1 *et seq.* In his Complaint, Plaintiff requested a jury trial and sought a declaratory judgment, compensatory damages, liquidated damages, and attorney's fees and costs. On January 27, 2003, Defendants filed an Answer denying the material allegations in Plaintiff's Complaint and asserting various affirmative defenses. After obtaining leave of Court, on June 25, 2003, Defendants filed an Amended Answer adding, *inter alia*, three further affirmative defenses. On November 6, 2003, following the close of discovery, the parties filed their dispositive motions along with supporting memoranda and affidavits.

II. Statement of Facts

IHC is licensed by the North Carolina Alcoholic Beverage Control Commission ("ABC") as a malt beverage and wine wholesaler and distributor, and is headquartered in Greensboro, North Carolina. (Pleading No. 21, Am. Answer. ¶ 10; Pleading No. 40, Appendix to Defs.' Brief in Supp. of Mot. for Summ. J. ("Appendix"), Ex. 1, Darragh Klemons Aff. ¶ 4.) IHC distributes the products of Miller, Coors, Heineken, Guinness, St. Pauli, Pabst and other minor manufacturers. (Klemons Aff. ¶ 4.) During the time relevant to this action, IHC's Greensboro warehouse sold approximately 3.4 million cases and 18,000 kegs of beer per year. *Id.* ¶ 6. Approximately 50 percent of that volume was either produced at or transshipped from the Miller plant in Eden, North Carolina;[1] ten percent was produced at and shipped directly from the Miller plant in Albany, Georgia; 20 percent was produced at or transshipped from the Coors plant in Elkton, Virginia; and the remaining 20 percent was produced at and shipped from various manufacturers' plants outside North Carolina or

[1] Product shipped from the Miller plant in Eden, North Carolina consisted of product brewed in Eden as well as product transshipped by Miller from other Miller plants in Georgia, Ohio, Texas, and Wisconsin. (Klemons Aff. ¶ 5.)

the United States. *Id.* No processing or alteration of the beer occurred while it was stored in IHC's warehouse. *Id.* ¶ 8.

Pursuant to the ABC's strict statutory and regulatory scheme, the beer manufacturers assigned IHC to a specific geographic area in North Carolina in which IHC was the exclusive distributor of the manufacturers' products.[2] *Id.* ¶¶ 4, 9; *see also* N.C. Gen. Stat. § 18B-1303(a)(2003). IHC was required to distribute the manufacturers' products to any licensed retailer in its assigned geographic area regardless of the volume of the retailer's orders or its distance from IHC's warehouse. (Klemons Aff. ¶ 9; *see also* N.C. Gen. Stat. § 18B-1303(b)(2003); N.C. Admin. Code tit. 4, r. 2T.0610 (Dec. 2003.) IHC ordered products from the manufacturers on a monthly basis based on the licensed retailers' needs and sales data. (Klemons Aff. ¶ 7; Appendix, Ex. 9, Thomas Fulcher Dep. at 32, 38; Ex. 10, Matthew Brock Dep. at 36-38.) Occasionally, IHC specially ordered products for a specific retailer. (Klemons Aff. ¶ 7.) Turnover among the licensed retailers IHC served was less than five percent per year, and the demand for the products IHC distributes was almost constant, with routine seasonal fluctuations. *Id.* ¶ 9.

Plaintiff Talton began working for IHC as a "driver/sales representative" on September 15, 1998. (Pleading No. 37, James Talton, Jr. Aff. ¶ 3.)[3] On February 25, 2000, Plaintiff was assigned to the "swing route driver" position. *Id.* ¶ 4. Plaintiff's job duties as a swing route driver included driving a tractor trailer to deliver beer from IHC's warehouse in Greensboro to licensed retail customers in Forsyth, Guilford, Rockingham and Alamance counties. (Appendix, Ex. 2, Jeff

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[2] The beer manufacturers are prohibited by North Carolina law from selling beer directly to licensed retailers. (Klemons Aff. ¶ 9; *see also* N.C. Gen. Stat. § 18B-1104.)

[3] Plaintiff makes no claim that he is entitled to unpaid overtime wages during the time that he was a "driver/sales representative." (Appendix, Ex. 15, Pl.'s R. 26(a)(1) Discl. ¶ 3.)

Johnson Aff. ¶¶ 5, 7; Ex. 11, James H. Talton, Jr. Dep. Vol. I at 254.) Plaintiff held a Class A commercial driver's license, completed driver time logs as required by United States Department of Transportation ("DOT") regulations, and underwent medical, controlled substance and safety verifications as required by DOT regulations. (Talton Dep. Vol. I at 62, 150-51, 153-54; Appendix, Ex. 6, 30(b)(6) Dep. (Mary K. Hillerby) at 21-22, 25.) As a swing route driver, Plaintiff did not have any pre-assigned routes, but instead filled in on any route that was missing a driver as needed each working day. (Talton Dep. Vol. I at 74-75.) Although all of Plaintiff's routes were in North Carolina, on one occasion Plaintiff crossed into Virginia briefly in order to turn his delivery truck around and head back into North Carolina to service a North Carolina retailer. Plaintiff maintains that he could have reached this retailer without crossing into Virginia, but that he was not familiar with the roads because he had not driven that route before. *Id.* at 257; Pleading No. 36, Pl.'s Mem. in Supp. of Mot. for Partial Summ. J., James H. Talton, Jr. Dep. Vol. II at 323-24; Pleading No. 44, Pl.'s Mem. in Opp. to Defs.' Mot. for Summ. J., James Talton, Jr. Second Aff. ¶¶ 10, 12.).

When Plaintiff arrived at the retailer locations, Plaintiff printed an invoice for the beer; obtained the retailer's approval for the beer; unloaded the beer from the truck; priced the beer in accordance with the retailer's instructions; stocked the beer in the retailer's selling area; removed spoiled or damaged beer containers; and consummated the sale of the beer by securing payment from the retailer. (Talton Dep. Vol. I at 173, 191, Defs.' Ex. 18.) About once a month, Plaintiff also picked up empty kegs from licensed retailers and returned them to IHC for eventual return to the manufacturers. *Id.* at 237; Klemons Aff. ¶ 8.

At the outset of Plaintiff's employment, Plaintiff signed a "blanket" wage withholding authorization, permitting IHC to deduct from his wages any cash shortages for which Plaintiff was

responsible. (Pl.'s Mem. in Supp. of Mot. for Partial Summ. J., Talton Dep. Vol. I, Defs.' Ex. 21; Talton Dep. Vol. II at 313-19.) Plaintiff testified that he never withdrew this authorization and was informed by IHC in writing in advance of any deductions from his pay. *Id.* at 281-82, 352. Delivery manager Thomas Fulcher testified that employees are given at least one week if not two week's notice of any shortage they owe before the shortage is deducted from the employees' paycheck. (Fulcher Dep. at 55.)

After suffering an on-the-job injury, Plaintiff stopped performing the duties of a swing route driver on June 11, 2002. Accordingly, Plaintiff does not seek any unpaid overtime wages after June 11, 2002 in this action. *Id.* at 285-86, 289. Plaintiff resigned from his employment with IHC shortly thereafter in 2002. *Id.* at 289.

III. Discussion

A. The Parties' Dispositive Motions

1. Summary Judgment Standard of Review

The summary judgment standard of review under Rule 56 is well established. A party is entitled to judgment as a matter of law upon a showing that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The material facts are those identified by controlling law as essential elements of claims asserted by the parties. A genuine issue as to such facts exists if the evidence forecast is sufficient for a reasonable trier of fact to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). No genuine issue of material fact exists if the nonmoving party fails to make a sufficient showing on an essential element of its case as to which it would have the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In evaluating a forecast of evidence on summary judgment review, the court must view the

facts and inferences reasonably to be drawn from them in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255.

When the moving party has carried its burden, the nonmoving party must come forward with evidence showing more than some "metaphysical doubt" that genuine and material factual issues exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), *cert. denied,* 481 U.S. 1029 (1987). A mere scintilla of evidence is insufficient to circumvent summary judgment. *Anderson*, 477 U.S. at 252. Instead, the nonmoving party must convince the court that, upon the record taken as a whole, a rational trier of fact could find for the nonmoving party. *Id.* at 248-49. Trial is unnecessary if "the facts are undisputed, or if disputed, the dispute is of no consequence to the dispositive question." *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315-16 (4th Cir. 1993).

2. Cross-Motions for Summary Judgment on Plaintiff's Claim under the FLSA for Unpaid Overtime Wages

Both parties have moved for summary judgment on Plaintiff's claim under section 7(a)(1) of the FLSA for unpaid overtime wages. The following discussion will address and apply to both motions.

Section 7(a)(1) of the FLSA provides as follows:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours per week unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1)(2003). In order to establish a claim for unpaid overtime wages under section 7(a)(1), Plaintiff must show by a preponderance of the evidence that he worked overtime hours without compensation, the amount and extent of the work as a matter of just and reasonable

inference, and that Defendants knew of the uncompensated overtime. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946); *In re Food Lion Effective Scheduling Litigation*, 861 F. Supp. 1263, 1271 (E.D.N.C.1994). Plaintiff must also establish that Defendants employed Plaintiff in an enterprise that was engaged in interstate commerce. 29 U.S.C. §§ 203(s), 207(a)(1)(2003); *Brock v. Hamad*, 867 F.2d 804, 807-08 (4th Cir. 1989).

Plaintiff asserts that the undisputed facts in this case establish all of these elements: Defendants have admitted that IHC is an enterprise engaged in interstate commerce (Pl.'s Mem. in Supp. of Mot. for Partial Summ. J., Ex. A; Am. Answer ¶¶ 7, 11), that Plaintiff worked overtime during the relevant time period, i.e., from February 25, 2000 to June 11, 2002, and that Defendants did not pay Plaintiff overtime wages during this time. (Appendix, Ex. 8, 30(b)(6) Dep. (Thomas Eugene Fulcher) at 22; Hillerby Dep. at 25-29.) The Court agrees that Plaintiff has made a prima facie showing of his entitlement to overtime compensation during the relevant time period.

However, Defendants may nevertheless avoid liability to Plaintiff for unpaid overtime compensation if they can demonstrate the applicability of one of the FLSA's exemptions to overtime liability. Here, Defendants oppose Plaintiff's motion for partial summary judgment and base their own motion for summary judgment on the grounds that they are exempt from the FLSA's overtime requirements by reason of the outside sales, executive and Motor Carrier Act exemptions. Plaintiff maintains that Defendants cannot show that any of these exemptions apply to Plaintiff. Thus, resolution of both dispositive motions in regard to Plaintiff's FLSA claim will turn on the applicability of the above-cited exemptions to the facts of this case.

At the outset, the Court notes that exemptions to the FLSA's requirements are "narrowly construed against the employers seeking to assert them and their application limited to those

establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). Defendants bear the burden of establishing the applicability of any exemption to FLSA's overtime requirements. *Id.* at 394 n.11.

The Motor Carrier Act exemption provides that the FLSA's overtime requirements do not apply to "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49 [the Motor Carrier Act]." 29 U.S.C. § 213(b)(1)(2003). The Motor Carrier Act gives the Secretary of Transportation jurisdiction over interstate transportation by a "motor private carrier."[4] 49 U.S.C. §§ 13501, 31502 (2003). The dispute in this case centers on whether Plaintiff's job duties as a swing route driver for IHC involved "interstate" transportation, and thus fall within the ambit of the Motor Carrier Act exemption to the FLSA. Plaintiff maintains that because his delivery routes were solely within the state of North Carolina, i.e., were intrastate, his job duties do not fall within the Motor Carrier Act exemption.

The Court finds merit to Plaintiff's argument that his delivery routes were solely intrastate. Defendants place much emphasis on the fact that one of Plaintiff's routes involved the possibility that Plaintiff would have to cross into Virginia and then re-enter North Carolina in order to service a licensed retailer in North Carolina who was located close to the state border. However, the undisputed evidence is that Plaintiff crossed into Virginia while driving on this route only one time during his entire employment with IHC. Furthermore, Plaintiff explained that he was unfamiliar

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[4] The parties do not dispute that IHC meets the definition of a "motor private carrier." IHC is "a person . . . transporting property by motor vehicle," is "the owner . . . of the property being transported," and "the property is being transported for sale . . . or to further a commercial enterprise." 49 U.S.C. § 13102(13)(2003).

with the roads and later learned that he could have reached the retailer without ever crossing into Virginia. The Court finds as a matter of law that this isolated and inadvertent detour into Virginia falls squarely within the *de minimus* exception to interstate activities. *Dole v. Circle "A" Constr., Inc.*, 738 F. Supp. 1313, 1322 (D. Idaho 1990)(a driver is not exempt under the Motor Carrier Act merely because he takes one or two interstate trips); *Kimball v. Goodyear Tire & Rubber Co.*, 504 F. Supp. 544, 548 (E.D. Tex. 1980)(denying Motor Carrier Act exemption where only 0.17% of trips were interstate); *Coleman v. Jiffy June Farms, Inc.*, 324 F. Supp. 664 (S.D. Ala. 1970), *aff'd*, 458 F.2d 1139 (5th Cir. 1971)(where only 0.23% of driver employee's deliveries were interstate, Motor Carrier Act exemption did not apply).

Nevertheless, the Court's analysis does not end here. Even if Plaintiff's delivery of the beer remained intrastate in nature, the interstate commerce requirement could still be satisfied if the beer originated from out-of-state and was transported in a "practical continuity of movement" in the flow of interstate commerce. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943); *Martin v. Airborne Express,* 16 F. Supp. 2d 623, 628 (E.D.N.C. 1996), *aff'd*, 155 F.3d 559 (4th Cir. 1998)("[K]ey determination is whether the nature of the transportation evinces a 'practical continuity of movement' between the states."); *Foxworthy v. Hiland Dairy Co.*, 997 F.2d 670, 672 (10th Cir. 1993)("Transportation within a single state may remain 'interstate' in character when it forms a part of a 'practical continuity of movement' across state lines from the point of origin to the point of destination.")(citation omitted); 29 C.F.R. § 782.7(b)(1) (interstate commerce requirement satisfied "where the vehicles do not actually cross [s]tate lines but operate solely within a single [s]tate, if what is being transported is actually moving in interstate commerce.") In addition, whether transportation of goods is intrastate or interstate can be determined by the shipper's fixed and

persisting intent at the time of shipment. *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1469 (9th Cir. 1997); *Foxworthy*, 997 F.2d at 672; 29 C.F.R. § 782.7(b)(1)(2003)(inquiry is whether shipper has a "fixed and persisting transportation intent beyond the terminal storage point at the time of shipment.")

In *Jacksonville Paper*, the United States Supreme Court established three categories of distribution of out-of-state products to retailers in-state:

(1) When the goods are purchased by the wholesaler upon the order of a customer with the definite intention that they be carried at once to the customer;

(2) When the goods are obtained by the wholesaler to meet the needs of specified customers pursuant to an understanding, though not for immediate delivery;

(3) When the goods are acquired by the wholesaler based on anticipation of the needs of specific customers, rather than upon prior orders or contracts.

Jacksonville Paper, 317 U.S. at 569-70; *Galbreath v. Gulf Oil Corp.*, 413 F.2d 941, 945 (5th Cir. 1969)(citing *Allesandro v. C.F. Smith Co.*, 136 F.2d 75 (6th Cir. 1943)). Categories (1) and (2) always constitute interstate commerce within the meaning of the Motor Carrier Act exemption. Category (3) constitutes interstate commerce when "there is a particularity of evidence to show that the goods in question are 'different from goods acquired and held by a local merchant for local disposition.'" *Galbreath*, 413 F.2d at 945 (quoting *Jacksonville Paper*, 317 U.S. at 570). Defendants argue that Plaintiff's delivery of beer for IHC constitutes interstate commerce under either category (2) or category (3) of *Jacksonville Paper*.

After careful consideration of the dynamics of the heavily regulated and unique beer distribution industry in North Carolina, the Court is persuaded that Plaintiff's intrastate delivery of out-of-state beer qualifies as interstate commerce under category (2) of *Jacksonville Paper*. The

undisputed evidence shows that IHC ordered beer for "specified customers" as required by *Jacksonville Paper* and its progeny. IHC was required by state law to deliver beer to all licensed retailers in its assigned geographic area, regardless of the retailers' size or distance from IHC's warehouse.[5] Furthermore, IHC was the exclusive distributor of the beer brands it was assigned within its geographic area, and retailers could not purchase beer directly from the manufacturers. Thus, if a licensed retailer in IHC's assigned geographic area wanted to purchase a brand of beer that IHC distributed, the retailer was required to order the beer from IHC. This highly structured distribution system created a static group of identifiable customers that IHC serviced. Indeed, customer turnover was less than five percent per year. *See Shultz v. South Georgia Dairy Co-op, Inc.*, No. 881, 1970 WL 741, *1 (M.D. Ga. July 24, 1970)(unpublished opinion)(finding interstate commerce requirement met where, *inter alia*, customer turnover was relatively small.)

IHC also ordered beer to "meet the needs" of its customers, as required by *Jacksonville Paper* and its progeny. IHC's evidence is that company sales representatives visited licensed retailers and determined, based on the retailers' current inventory and past sales history, how much beer should be ordered. Demand for the beer was fairly constant, with routine seasonal fluctuations. The sales representative entered the required quantity of beer into a handheld device which transmitted the order electronically to IHC's warehouse. At the warehouse, the requested beer was then loaded onto

[5] IHC may only decline to service a licensed retailer for "legitimate business reasons" unrelated to the retailer's size or distance from IHC, or the sex, race, age, religion or national origin of the retailer. N.C. Admin. Code tit. 4, r. 2T.0610 (2003).

a truck for delivery to the retailer.[6] IHC ordered beer from the beer's manufacturers approximately once per month based upon the specific sales data acquired by IHC's sales representatives, i.e., to meet the licensed retailers' needs.[7] *See Shultz*, 1970 WL 741 at *1, *4 (finding Motor Carrier Act exemption applicable where company ordered out-of-state goods based on immediate past sales to its customers and the amount needed to meet the customers' needs for a ten-day period and distinguishing items that came to rest for a considerable period of time in the company warehouse because they were not ordered to fill the needs of any particular customer at any particular time.)

IHC also ordered the beer for its customers "pursuant to an understanding," within the meaning of *Jacksonville Paper* and its progeny. Clearly, by operation of North Carolina's ABC law, the licensed retailers had an "understanding" with IHC that IHC was required to provide them with enough beer to meet their sales needs. *See Galbreath*, 413 F.2d at 943 (Motor Carrier Act exemption applied where company ordered out-of-state gasoline based on a written agreement with customers requiring company to always provide each customer with an adequate supply to meet the

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[6] The Court notes that the fact that the beer is temporarily stored in IHC's warehouse while awaiting delivery to the retailers does not defeat its interstate character. *Jacksonville Paper* and its progeny certainly allowed for that fact in category (2) by including the phrase, "though not for immediate delivery." *See also Jacksonville Paper*, 317 U.S. at 569 ("If there is a practical continuity of movement from the manufacturers . . . through respondent's warehouse and on to customers whose prior orders . . . are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse.")

[7] Plaintiff argues that when beer arrived at IHC's warehouse, it was not set aside for any particular customer, but rather placed in IHC's stock, thus ending its interstate character. (Pl.'s Mem. in Opp. to Defs.' Mot. for Summ. J. at 8, Talton Second Aff. ¶ 18.) However, the Court does not find this fact determinative. *See Galbreath*, 413 F.2d at 943 (gasoline transported via pipeline from out-of-state was stored in one tank and not segregated for particular customers.) A more critical issue is whether the goods themselves are processed or altered while in the wholesaler's possession. *Shultz*, 1970 WL 741 at *1; *Galbreath*, 413 F.2d at 943. The undisputed evidence before the Court is that the beer is not processed or altered in any way during its brief time in IHC's warehouse.

requirements of his trade.) IHC did not enter into written purchase agreements with the licensed retailers because wholesalers are prohibited from doing so by North Carolina's ABC law. *See* N.C. Admin. Code tit. 4, r. 2T.0706 (2004). The Court has found no authority to the effect that the category (2) test of *Jacksonville Paper* requires a *written* contract, and in fact the Supreme Court's use of the word "understanding" indicates otherwise. 317 U.S. at 568-69. The Court sees no reason to imply such a requirement in this case when a fully analogous "understanding," an implied requirements contract, between IHC and the licensed retailers arises by operation of North Carolina's ABC law. Indeed, the Court notes that the implied requirements contracts arising out of ABC law in this case are an even stronger legal relationship than most express requirement contracts. In this case, if IHC breached its legal obligations to the licensed retailers, not only would it face potential contract damages, but it would risk the revocation of its business license by the ABC.

Finally, to determine whether IHC's beer deliveries are interstate or intrastate in nature, the Court may look to the "fixed and persisting intent" of the shippers (i.e., manufacturers) of the beer at the time of shipment ascertained from all the facts and circumstances surrounding the transportation. *Klitzke*, 110 F.3d at 1469; *Foxworthy*, 997 F.2d at 672; 29 C.F.R. § 782.7(b)(2)(2003)(inquiry is whether shipper has a "fixed and persisting transportation intent beyond the terminal storage point at the time of shipment.") Here, it is clear that the beer manufacturers do not intend for IHC's warehouse to be, in any sense, a terminal point of their beer shipments. It is of no moment that the beer manufacturers do not know the specific ultimate destination for each case of beer they ship; they have a fixed intention that the beer move beyond the warehouse to the licensed retailers. *Klitzke*, 110 F.3d at 1470. In any event, the beer leaves the point of manufacture with a narrowly defined ultimate destination: IHC serves an identifiable, static set

of retailers and all of the beer the manufacturers ship to IHC is shipped to one of these specific retailers. *See Central Freight Lines v. Interstate Commerce Comm'n*, 899 F.2d 413, 420 (5th Cir. 1990)(finding interstate commerce where, *inter alia*, each storage terminal served only 20 to 25 customers and all the fertilizer stored at the terminal was shipped to one of those 20 to 25 customers.)

The Court concludes that Plaintiff's intrastate transportation of beer originating from out-of-state constitutes interstate commerce under category (2) of *Jacksonville Paper.* As such, Plaintiff is exempt from the overtime requirements of the FLSA pursuant to the Motor Carrier Act exemption, 29 U.S.C. 0167 213(b)(1). **IT IS THEREFORE RECOMMENDED** that Plaintiff's motion for partial summary judgment (Pleading No. 35) be **DENIED**, and that Defendants' motion for summary judgment (Pleading No. 38) on this claim be **GRANTED**.[8]

3. Defendants' Motion for Summary Judgment on Plaintiff's Claim Under the NCWHA for Unpaid Wages

In his complaint, Plaintiff alleges that throughout his employment, Defendants improperly withheld cash shortages from his paychecks in violation of section 95-25.9 of the NCWHA. N.C. Gen. Stat. § 95-25.9 (2003). Defendants move for summary judgment on this claim on the grounds that Plaintiff signed a "blanket" wage deduction authorization that complied in all respects with the NCWHA. Plaintiff opposes Defendants' motion on the grounds that two North Carolina Department

[8] In light of the Court's determination, the Court need not and does not reach Defendants' argument that Plaintiff's participation in returning empty kegs and dunnage from retailers to IHC's warehouse for eventual return to the out-of-state manufacturers constitutes interstate commerce under the Motor Carrier Act, nor that Plaintiff is exempt from the overtime requirements of the FLSA by virtue of the outside sales and executive exemptions. The Court also need not address issues of whether Defendant Christopher Caffey is an "employer" under the FLSA, and whether Defendants' alleged violation of the FLSA was "willful" or supported by "good faith."

of Labor ("NCDOL") opinion letters require that employers notify employees of their right to withdraw a "blanket" wage deduction authorization in order for such authorization to be valid. Plaintiff contends that he was never informed that he had the right to withdraw the authorization.

Section 95-25.8 of the NCWHA provides:

> An employer may withhold or divert any portion of an employee's wages when:
>
> . . . .
>
> (2) The employer has a written authorization from the employee which is signed on or before the payday for the pay period from which the deduction is to be made indicating the reason for the deduction.
>
> . . . .
>
> b. When the amount of the proposed deduction is not known and agreed upon in advance, the authorization need not specify a dollar amount which can be deducted from one or more paychecks, provided that the employee receives advance notice of the specific amount of any proposed deduction and is given a reasonable opportunity to withdraw the authorization before the deduction is made.

Section 95-25.9 of the NCWHA provides:

> Cash shortages, inventory shortages, or loss or damage to an employer's property may not be deducted from an employee's wages unless the employee receives notice of the amount to be deducted at least seven days prior to the payday on which the deduction is to be made, except when a separation occurs the seven-day notice is not required.

Regulations interpreting the wage deduction sections of the NCWHA provide:

> An employer shall not make a deduction under a blanket authorization until the employee has been given:
>
> (1) Advance notice of the specific amount of the proposed deduction. For purposes of deductions involving cash shortages, inventory shortages, or loss or damage to an employer's property, advance notice shall be at least the seven day period described in G.S. 95-25.9.
>
> (2) A "reasonable opportunity to withdraw" the authorization before the deduction is made. A reasonable opportunity to withdraw a blanket authorization shall be at

least three calendar days from the date of the employer's notice of the specific amount of the deduction to be taken.

N.C. Admin. Code tit. 13, r. 12.0-305(d)(Aug. 2003).

The evidence before the Court demonstrates that Defendants' deduction of cash shortages from Plaintiff's paychecks met all of the NCWHA's statutory and regulatory requirements. At the outset of Plaintiff's employment, Plaintiff signed a "blanket" wage withholding authorization, permitting IHC to deduct from his wages any cash shortages for which Plaintiff was responsible. Plaintiff never withdrew this authorization and was informed by IHC in writing of the specific dollar amount at least seven days in advance of any deductions from his pay.

Plaintiff maintains that two opinion letters issued by the NCDOL require employers to inform employees of their right to withdraw the wage withholding authorization in order for the authorization to be valid. (Pl.'s Mem. in Opp. to Defs.' Mot. for Summ. J., Ex. A.) Plaintiff testified unequivocally that he was never informed of his right to withdraw the "blanket" authorization and was not otherwise aware that he had that right. (Talton Dep. Vol. II at 315-16.)

The Court finds no merit to Plaintiff's argument. Agency opinion letters do not have force of law, because they have not been subjected to notice and comment rulemaking or a formal adjudication. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Cunningham v. Scibana*, 259 F.3d 303, 306 (4th Cir. 2001), *cert. denied*, 534 U.S. 1167 (2002); *Chao v. North Carolina Growers Assoc.*, 280 F. Supp. 2d 500, 508 (W.D.N.C. 2003)(agency interpretive bulletins are not conclusive even in the cases in which they directly deal because they do not constitute an interpretation which binds a district court's processes). In any event, the NCWHA and its regulations do *not* require employers to inform employees of their right to withdraw the blanket wage deduction authorization.

It is the province of the North Carolina legislature, and not this Court, to amend the NCWHA to require employers to inform employees of their right to withdraw the blanket wage deduction authorization.

As the Defendants' practices with regard to deducting cash shortages from Plaintiff's paychecks conformed to the requirements of the NCWHA, **IT IS THEREFORE RECOMMENDED** that Defendants' motion for summary judgment be **GRANTED** on this claim.

B. The Parties' Motions to Strike

1. Plaintiff's Motions to Exclude Defendants' Affidavits

Plaintiff has submitted two motions to exclude the affidavits and testimony of two of Defendants' witnesses, Lowell Edward Jones of the Miller Brewing Company and Michael A. Tisdell of the Coors Brewing Company. (Pleading Nos. 45, 56.) The Court has not relied on the Jones or Tisdell affidavits in concluding that Defendants are entitled to judgment, and Plaintiff's motions to strike should therefore be dismissed as moot. **IT IS SO RECOMMENDED.**

2. Defendants' Motion to Strike Plaintiff's Affidavits and Exhibits

Defendants have moved to strike the Affidavit of Chris Haaf, portions of the Second Affidavit of Plaintiff and the four exhibits submitted in support of Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment. (Pleading No. 49.) The Court notes that even after full consideration of these challenged materials, the Court has recommended summary judgment in favor of Defendants on all claims. Accordingly, **IT IS THEREFORE RECOMMENDED** that Defendants' motion to strike be **DISMISSED** as moot.

C. Plaintiff's Motion to Enlarge the Time Period for Filing Materials in Support of his Memorandum in Opposition to Summary Judgment

Plaintiff has moved to enlarge the time period for filing materials in support of his memorandum in opposition to summary judgment. (Pleading No. 59.) The Court notes that even after full consideration of the materials in question, the Court has recommended summary judgment in favor of Defendants on all claims. **IT IS THEREFORE RECOMMENDED** that Plaintiff's motion to enlarge the time period for filing these materials be **DISMISSED** as moot.

V. Conclusion

For reasons set forth above, **IT IS RECOMMENDED** that Plaintiff's motion for partial summary judgment (Pleading No. 35) be **DENIED**, that Defendants' motion for summary judgment (Pleading No. 38) be **GRANTED** as to all claims, and that this case be dismissed with prejudice. **IT IS FURTHER RECOMMENDED** that Plaintiff's motions to exclude Defendants' affidavits (Pleading Nos. 45, 56) be **DISMISSED** as moot, that Defendants' motion to strike Plaintiff's affidavits and exhibits (Pleading No. 49) be **DISMISSED** as moot, and that Plaintiff's motion to enlarge the time period for filing materials in support of his memorandum in opposition to summary judgment (Pleading No. 59) be **DISMISSED** as moot.

Further, in view of the recommendations herein, which would have the effect of terminating this action, **IT IS ORDERED** that this action is removed from the April 5, 2004 trial calendar and the parties shall at this time stand down from trial preparation pending further orders from the Court.

P. Trevor Sharp, U.S. Magistrate Judge

March 11, 2004